1979

Terry Lynne Jones v. William K. Hinkle and Kathryn P. Hinkle : Brief of Respondents

Utah Supreme Court

Joseph L. Henriod; Stephen L. Henriod; Attorneys for Plaintiff-Appellant;
Dean L. Gray; Gustin, Adams, Kasting & Liapis; Attorneys for Defendants-Respondents;

IN THE SUPREME COURT

OF THE STATE OF UTAH

----------o0o----------

TERRY LYNNE JONES, Plaintiff-Appellant,	)	
v.	)	Case No. 16525
WILLIAM K. HINKLE and KATHRYN P. HINKLE, Defendants-Respondents.	)	

----------o0o----------

BRIEF OF RESPONDENTS

Appeal from the Third Judicial District
Court of Salt Lake County, Utah
Honorable Christine M. Durham, Judge

Dean L. Gray
Gary E. Atkin
GUSTIN, ADAMS, KASTING & LIAPIS
1000 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111
Attorneys for Plaintiff-
Respondent

Joseph L. Henriod
Stephen L. Henriod
NIELSEN, HENRIOD, GOTTFREDSON & PECK
400 Newhouse Building
[illegible] Lake City, Utah 84111
Attorneys for Plaintiff-Appellant

IN THE SUPREME COURT

OF THE STATE OF UTAH

----------o0o----------

TERRY LYNNE JONES,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	Case No. 16525
	)	
WILLIAM K. HINKLE and KATHRYN P. HINKLE,	)	
	)	
Defendants-Respondents.	)	

----------o0o----------

BRIEF OF RESPONDENTS

Appeal from the Third Judicial District
Court of Salt Lake County, Utah
Honorable Christine M. Durham, Judge

Dean L. Gray
Gary E. Atkin
GUSTIN, ADAMS, KASTING & LIAPIS
1000 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111
Attorneys for Plaintiff-
Respondent

Joseph L. Henriod
Stephen L. Henriod
NIELSEN, HENRIOD, GOTTFREDSON & PECK
400 Newhouse Building
Salt Lake City, Utah 84111
Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

CASES CITED

Utah Cases Cited

OTHER JURISDICTIONS CITED

Idaho

OTHER AUTHORITIES CITED

IN THE SUPREME COURT

OF THE STATE OF UTAH

----------o0o----------

TERRY LYNNE JONES,

Plaintiff-Appellant,

v.

WILLIAM K. HINKLE and KATHRYN P. HINKLE,

Defendants-Respondents.

----------o0o----------

BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF CASE

This in an action by Plaintiff-Appellant (hereinafter referred to as "Plaintiff") for specific performance allegedly due from Defendant-Respondents (hereinafter referred to as "Defendants") under a Uniform Real Estate Contract and for damages allegedly incurred as a result of the failure of Defendants to perform thereunder. The action also involves a Counterclaim by Defendants for attorney's fees incurred in defense of the performance sought by Plaintiff.

DISPOSITION IN LOWER COURT

This matter was heard by the Court upon Motions for Summary Judgment filed by both parties. From an Order of the

Third Judicial District Court of Salt Lake County, the Honorable Christine M. Durham presiding, dismissing the Complaint of Plaintiff with prejudice and awarding Defendants the sum of $500.00 as attorney's fees, upon their Counterclaim, Plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Defendants seek to have the Judgment of the Trial Court affirmed and to have this Court award Defendants additional attorney's fees for defending this matter on appeal.

STATEMENT OF FACTS

Plaintiff's Statement of Facts is very thorough. A correction should be made, however, at page 6 of Plaintiff's Brief, in the second full paragraph, in what would appear to be a mere typographical error. The record, including page 45 of the transcript, clearly indicates that the rate of interest Plaintiff paid Defendants under the contract was more, not "less", than the rate paid by Defendants to Deseret Federal. In addition, it should be noted that the counsel for the parties stipulated before the Court that $500.00 would be reasonable attorney's fees for the services rendered up to the time of the Judgment. [Tr. 60]

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S COMPLAINT

Plaintiff argues that the Trial Court erred in granting Summary Judgment in this matter since other evidence may have been adduced at trial to ascertain the meaning and intent of the Uniform Real Estate Contract. Plaintiff relies on the general principle set forth by this Court in Continental Bank & Trust Company v. Bybee, 6 U.2d 98, 306 P.2d 773 (1957), for the proposition that the Court should have looked to the four corners of the instrument, other contemporaneous writings and extrinsic parole evidence of their intentions, before concluding the meaning of the contract and, more specifically, the paragraphs under consideration.

Plaintiff misinterprets the Court's statement in Continental, however. It was merely setting forth the Order in which the Court should look of various items. It does not change the general rule that the Court will not look to any contemporaneous writings or other evidence to interpret a contract unless the meaning cannot be ascertained from the contract itself. The Court in Continental, supra., specifically explained this concept, immediately following the quotation cited at page 11 of Plaintiff's Brief:

> If the ambiguity can be reconciled from a reasonable interpretation of the instrument, extrinsic evidence should not be allowed. (Citing cases)

This general rule was expressed as grounds for revising the Judgment of the Trial Court in E.A. Strout Western Realty Agency, Inc. v. Broderick, 522 P.2d 144 (Utah, 1974), wherein the Court explained:

> Parole evidence may be received to clarify ambiguous language in a contract, to show what the agreement was related to filling in blanks and to supply omitted terms which were agreed upon but inadvertenty left out of the written agreement. However, under the general rule, which is applicable here, parole evidence may not be given to change the terms of a written agreement which are clear, definite, and unambiguous. (522 P.2d at 145)

Again, in Hartman v. Potter, 596 P.2d 653 (Utah, 1979), cited at pp. 9-11 of Plaintiff's Brief, the Court noted:

> Deeds are to be construed like other written instruments, and where a deed is plain and unambiguous, parol evidence is not admissible to vary its terms. It is the court's duty to construe a deed as it is written, and in the final analysis, each instrument must be construed in the light of its own language and peculiar facts. It is also well know that the intention of the parties to a conveyance is open to interpretation only when the words used are ambiguous. (596 P.2d at 656)

To the same effect, see Cornwall v. Willow Creek Country Club 13 U.2d 160, 369 P.2d 928 (1962); Mark Steel Corporation v. Eimco Corporation, 548 P.2d 892 (Utah, 1976); and Jaye Smith Construction v. Board of Education, Granite School District, 560 P.2d 320 (Utah, 1977); and Big Butte Ranch, Inc. v. Holm, [illegible] P.2d 690 (Utah, 1977).

The Plaintiff further misinterprets what this Court has determined to constitute an ambiguity. Plaintiff contends that the contract must be ambiguous since:

> It is Plaintiff's position that the contract means what it says. It is apparently Defendants' position that the contract means something else. Although neither party has claimed that the contract is ambiguous, the respective positions of the parties imply that the Court need interpret the contract. (Plaintiff's Brief p. 11)

However, a contractual term is not ambiguous merely because the two parties interpret it differently. This Court, in Camp v. Deseret Mutual Benefit Association, 589 P.2d 780 (Utah, 1979), examined the meaning of a provision of an insurance policy term, "medical equipment", which Plaintiff contended included a specially equipped van and which the insurance company claimed did not include such a van. The Court held that there was no ambiguity to construe against the drafter of the agreement, explaining:

> Nor can we say the policy provision quoted above is ambiguous. A term is not necessarily ambiguous simply because one party seeks to endow it with a different meaning from that relied on by the drafter. (589 P.2d at 782)

Further, in the case at bar, the ambiguity claimed by Plaintiff to exist in the contract was between the language of paragraph 8 of the standard printed language of the Uniform Real Estate Contract and the language added

by the parties in paragraph 3 of that Contract, which stated that the contract balance of $40,000 was to be paid:

> Three hundred thirteen dollars and sixty cents or more on or before the 12th day of June and Three hundred thirteen dollars and sixty cents on or before the 12th day of each month thereafter until contract balance is paid in full, together with all interest accrued and in addition Buyer to make one balloon payment in the amount of $8,163.22 (Eight thousand one hundred sixty-three and twenty-two cents) on or before May 12, 1978. Said payment to include 1/12 of property taxes and 1/12 of hazard insurance monthly. If taxes and insurance increase, monthly payments to be adjusted accordingly. The buyers shall pay interest on the balloon payment of 9-1/2 interest until paid in full. (Emphasis added) (Tr. 13)

Clearly, the foregoing language contemplated a continuing contract with the Respondents until the $40,000 balance was paid in full. This language cannot be made ambiguous by other terms of the agreement since, in the event of such potential ambiguity, the terms added to the printed contract by the parties would govern. See Holland v. Brown, 15 U.2d 422, 394 P.2d 77 (1964) and Bank of Ephraim v. Davis, 559 P.2d 538 (Utah, 1977).

In accordance with the foregoing, it is generally held that the interpretation of a contract is a matter of law for the Court to decide, justifying Summary Judgment. In Overson v. United Sates Fidelity and Guaranty, 587 P.2d 149 (Utah, 1978), this concept was emphasized in denying an appeal

from a directed verdict for the defendant, wherein the appellant claimed the insurance policy was ambiguous. The Court explained:

> All of these facts being undisputed, there is no genuine issue of fact to be resolved. The accepted principle is that the interpretation of a contract's language is usually a law matter. This principle was articulated in the case of Central Credit Collection Corp. v. Grayson as follows:
>
> 'Interpretation of a written contract is usually a question of law for the court. If its terms are clear and unambiguous, summary judgment is proper. Even where some ambiguity exists in the contract, resolution of the ambiguity is still a question of law for the court, unless contradictory evidence is presented to clarify the ambiguity.'
>
> Therefore, because there is no dispute as to material fact the court could properly have granted USF & G's motion for summary judgment. (587 P.2d at 151)

See also Pacific States Lost Iron Pike Co. v. Harsh Utah Corporation, 5 U.2d 244, 300 P.2d 610 (1956), cited by the Court in support of Overson, supra.

Based upon all of the foregoing, Respondents respectfully submit that the Trial Court properly determined that the contract, as a matter of law, precluded the relief sought by Plaintiff and, therefore, properly granted Defendants' Motion for Summary Judgment, dismissing Plaintiff's Complaint, with prejudice.

POINT II

THE TRIAL COURT PROPERLY AWARDED ATTORNEY'S FEES TO DEFENDANTS FOR THE DEFENSE OF THIS ACTION

The general rule in Utah is clearly that, in the absence of a contractual provision or statute, attorney's fees are not recoverable, unless equity permits otherwise. See Ranch Homes v. Greater Park City, 529 P.2d 620 (Utah, 1979); B & R Supply Co. v. Bringhurst, 28 U.2d 442, 503 P.2d 1216 (1972); and Blake v. Blake, 17 U.2d 369, 412 P.2d 454 (1966). However, in the case at bar, attorney's fees are provided for in the contract at issue. That contract (a Uniform Real Estate Contract) provides, at paragraph 2:

> The Buyer and Seller each agree that should they default in any of the covenants or agreements contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise. (Tr. 14)

Based upon that provision and the other provisions of that contract, the Trial Court reasonably and properly concluded that this was a type of situation reasonably within the contemplation of the parties, where attorney's fees would be incurred and awarded as part of the Court's Judgment. The reasonableness of the amount of that award

($500.00) was stipulated to by counsel (Tr. 60) and is not being challenged by Plaintiff in this Appeal.

Furthermore, this Court in Swain v. Salt Lake Real Estate and Investment Company, 3 U.2d 121, 279 P.2d 709 (1955) held that a substantially similar matter justified the award of attorney's fees under the identical provision of another Uniform Real Estate Contract. There, the vendor brought an action to declare a forfeiture of the contract. The Trial Court rendered Judgment for the defendant purchaser, but denied attorney's fees on the basis that there had been no default and paragraph 21 applied only to situations where one of the parties defaulted in one of the covenants or agreements contained in the contract. The Court, in modifying the lower Court's Judgment to include $250.00 attorney's fees, explained that this was an action for "enforcing the agreement" and, therefore, within the meaning and intent of paragraph 21. The Court explained:

> The contract provides that 'The Buyer and Seller each agree that should they default in any of the covenants and agreements contained herein, to pay all costs and expenses that may arise from enforcing this agreement, either by suit or otherwise, including a reasonable attorney's fee.' It was held in the case of Forrester v. Cook, 77 Utah 137, 292 P.206, under a similar provision, that the vendor could not claim attorney's fees in an unlawful detainer action after declaration of forfeiture. The court reasoned that such an action was

> not one for 'enforcing the agreement' but rather one outside the contract. Such is not the present case, for while the seller sought to forfeit the contract, the buyer maintained his rights under the contract and incurred costs in enforcing the agreement. The parties contracted to pay such costs and stipulated that $250 would be reasonable.

In short, this Court logically concluded that enforcement of a contract necessarily includes defenses from such enforcement.

Similarly, in the case at bar, the Plaintiff endeavored to force Defendants to transfer the property, subject to the existing mortgage thereon, and to allow Defendants to assume that existing mortgage, allegedly in accordance with the provisions of the contract. Defendants defended against such a transfer on the basis that their rights under that contract were to receive certain monies from Plaintiff until the balance of the amounts due under the contract had been received. Defendants were, therefore, maintaining their rights under the contract and thereby incurred the attorney's fees in question, as contemplated in paragraph 21 of the Contract, in enforcing the agreement. (Tr. 14)

Defendants submit that they were entitled to the attorney's fees awarded by the Trial Court and that the Trial Court properly awarded the same as part of its Judgment dismissing Plaintiff's Complaint.

POINT III

DEFENDANTS ARE ENTITLED TO BE AWARDED ATTORNEY'S FEES FOR THE DEFENSE OF THIS APPEAL

Similarly to Point II, Defendants respectfully submit that they should be awarded the attorney's fees reasonably incurred in the defense of this Appeal, which reasonable amount Defendants claim to be $750.00.

The general rule in such matter is set forth in an excellent annotation at 52 A.L.R.2d 862, wherein the authors note:

> In cases in which a contractual provision for attorneys' fees existed in favor of a particular party, and such party was successful in the trial court but was required to defend against an unsuccessful appeal of the losing party, additional attorneys' fees have been allowed for the appeal.

The Utah Supreme Court has had occasion to address this issue in several cases and has indicated that the award of such fees on appeal are within the discretion of this Court. In Swain, supra., this Court refused to allow attorney's fees on appeal under the particular circumstances of that case, but indicated that in a proper case, such fees would be allowed. The Court stated:

> Since it appears probable that after the issues were drawn, the only real contest below was that concerning the award of an attorney's fee, we are of the opinion that the stipulated amount of such fee should cover services rendered in the court below and on appeal. Attorney's fees on appeal are discretionary with this court and, under the facts of this

> case, we are of the persuasion that no additional fee should be allowed. (279 P.2d at 711)

In Eastman v. Eastman, 558 P.2d 514 (Utah, 1976), this Court confronted the issue of additional attorney's fees on appeal and, apparently due to the fact that the matter at issue was a divorce and both parties had appealed, the majority of the Court held that the matter should be remanded for a determination of what amount, if any, should be awarded as additional attorney's fees for the appeal. Former Chief Justice Ellett, with the concurrence of Justice Maughan, concurred with the majority opinion, indicating that their differences were over which Court should determine the issue of additional attorney's fees on appeal. Justice Ellett explained:

> I concur except as to the remanding of this case to permit the trial court to determine whether attorney's fees should be awarded on appeal.
>
> The awarding of attorney's fees on appeal is a matter entirely within discretion of the appellate court. See Swain v. Salt Lake Real Estate and Investment Company, 3 Utah 2d 121, 279 P.2d 709 (1955); and 5 Am Jur.2d Appeal and Error, Sec. 1022. (558 P.2d at 516)

While the specific fact situation in Eastman, supra. required, in the opinion of a majority of the Court, a determination of the Trial Court as to what amount of additional attorney's fees should be awarded for the appeal, it clearly

establishes that additional attorney's fees should be awarded for the defense of an appeal, at least where an appropriate basis for the attorney's fees on the initial trial exists. On a matter such as that in the case at bar, the award of attorney's fees is required if the intention of the parties is to be carried out and the seller (Defendants) are to receive the full amount of the debt without deduction for legal expenses.

An excellent summary of this rationale is found in Vaughn v. Vaughn, 91 Idaho 544, 428 P.2d 50 (1967), wherein the Court explained:

> Plaintiff by motion duly served and filed herein, seeks additional attorneys fees in defending this appeal. The promissory note provides for reasonable attorneys' fees in the event suit be brought to enforce the note. The purpose of such a contractual provision in the note 'is to indemnify the creditor against the necessity of paying an attorney's fee * * * and to enable him to recover the full amount of his debt without deduction for legal expenses.' Hahn v. Hahn, 124 Cal.App.2d 97, 103, 266 P.2d 519, 523 (1954). Although several jurisdictions have held in similar situations that attorneys' fees should not be allowed for successfully defending an appeal on various grounds, i.e., that the contract was merged in the judgment or that the fees were not within the contemplation of the parties (See: Annot.: 52 A.L.R.2d 863 at 871), the more recent and in our opinion the better reasoned cases allow such fees on appeal. It is our conclusion that the plaintiff is entitled to fees for the services of her attorneys in defending this appeal. Otherwise, the

> amount of her recovery on the defendant's contractual obligation would be reduced contrary to the purpose of the contractual provision for payment of attorneys' fees in the event of suit brought to enforce the note. Steele v. Vanderslice, 90 Ariz. 277, 367 P.2d 636 (1961); Anderson v. Hiatt, 181 Cal.App.2d 9, 4 Cal.Rptr. 858 (Cal.App.1960). Hahn v. Hahn, 123 Cal.App.2d 97, 266 P.2d 519 (Cal.App.1954); Puget Sound Mutual Savings Bank v. Lillions, 50 Wash.2d 799, 314 P.2d 935 (1957). Cirimele v. Shinazy, 134 Cal.App.2d 50, 285 P.2d 311, 52 A.L.R.2d 860 (Cal.App. 1955). Annot: 52 A.L.R.2d 863; 17 Am. Jur.2d Contracts §292, p. 708.

Similarly, in the case at bar, the contract provided for such indemnification against legal and other expenses resulting from the enforcement of the contract and, therefore, it is not unreasonable for the Defendants to request the award of attorney's fees for the defense of this appeal.

It is respectfully submitted that an attorney's fee of $750.00 is an extremely reasonable fee for such an appeal in view of the amount of time necessarily involved in preparation of a Supreme Court Brief and arguing a matter such as this to this Court. Defendants respectfully submit, therefore, that an additional award of $750.00 attorney's fees should be made to Defendants as part of the Order of this Court affirming the decision of the Trial Court.

CONCLUSION

Defendants respectfully submit that the Trial Court's action in this matter was fully in accord with the principals

enunciated by this Court in earlier matters and should be affirmed. The Contract in this matter, as a matter of law, simply did not create any right on the part of the Plaintiff to the relief sought from that Court. Since substantial attorney's fees were incurred in the defense of the Plaintiff's unfounded claim, the Court properly awarded Defendants Judgment upon their Counterclaim for the reasonable amount of such fees, so that Defendants would still receive the full amount of the debt, as agreed to under that Contract. For the same reason, it is respectfully submitted, this Court should award Defendants an additional $750.00 as attorney's fees on this Appeal, pursuant to paragraph 21 of the Uniform Real Estate Contract. (Tr. 14)

Respectfully submitted this 17 day of October, 1979.

GUSTIN, ADAMS, KASTING & LIAPIS

By _____
DEAN L. GRAY
GARY E. ATKIN
Attorneys for Plaintiff-Respondent

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing Brief of Respondents was mailed, postage prepaid, to Joseph L. Henriod, Esq., and Stephen L. Henriod, Esq., Nielsen, Henriod, Gottfredson & Peck, at 400 Newhouse Building, Salt Lake City, Utah, 84111, on this 18 day of October, 1979.

_____